In striking contrast with this attitude is a recent Texas case, *Clifton* v. *Charles* (Tex. 1909) 116 S. W. 120, in which, despite the conscious misrepresentation by the vendor that he owned land which belonged to others, only nominal damages were granted. The vendee's only remedy is apparently an action in tort. While the decision has the merit in logic of disregarding the vendor's motive, it is hardly supported by the earlier Texas cases,[22] and is in conflict with the otherwise universal practice of giving substantial damages in case of the vendor's fraud or wilful refusal to convey.[23]

THE RIGHT TO QUESTION THE CONSTITUTIONALITY OF A LAW.—The reluctance of the courts to pass upon the constitutionality of legislative enactments is traceable to the considerations once thought to negative the existence of this inferential power. As late as 1825, it was urged that the legislative and judicial, being co-ordinate departments of the government, the recognition in the latter of a right to revise the acts of the former would subordinate the one to the other, thus overthrowing the system of checks and balances.[1] Nevertheless, following the familiar practice of the English courts of overruling laws in conflict with the Colonial Charters,[2] this power of judicial revision, sanctioned by necessity,[3] came to be generally recognized in the United States, though repudiated in continental countries under written constitutions. Mindful, however, of the danger of its abuse, the courts have refrained from exercising it except within the narrowest limits.[4] Its scope is strictly judicial,[5] and an opinion of the constitutionality of a law will not be given, nor even formed, until the question is raised in the form of serious litigation. A friendly[6] or fictitious[6] suit is not enough. Despite the possibility of an indefinite enforcement of an unconstitutional law before some private individual assumes the burden of questioning it, the judiciary cannot act until an attempt is made to use it as an instrument for maintaining rights supposed to have been created by a statute, or for the defense of a constitutional right which would be violated by the enforcement of a statute.[7] If the law in question is then, beyond a reasonable doubt, in excess of legislative authority, it is simply disregarded, and the constitutional decision is found in the reasons assigned for the judgment.[8] In no proper sense, therefore, is it true, as frequently stated, that the courts were established as a check upon the legislature. Any other principle than that the decision of a constitutional question is merely incidental to a determination of the rights of *bona fide* litigants would lead the courts from the domain

[22]Sutton *v.* Page (1849) 4 Tex. 142; Hall *v.* York's Admr. (1859) 22 Tex. 642; Wheeler *v.* Styles (1866) 28 Tex. 240; Roberts *v.* McFadden (1903) 32 Tex. Civ. App. 47.

[23]Allen *v.* Atkinson (1870) 21 Mich. 251; Driggs *v.* Dwight (N. Y. 1837) 17 Wend. 71; Kirkpatrick *v.* Downing (1874) 58 Mo. 32; Tracy *v.* Gunn (1883) 29 Kan. 508.

[1]Dissenting opinion of Gibson, J., Eakin *v.* Raub (Pa. 1825) 12 S. & R. 330, 344.

[2]7 Harv. L. Rev. 130.

[3]Cooley, Const. Lim. (7th Ed.) 228, 229.

[4]Calder *v.* Bull (1798) 3 Dall 386, 399.

[5]Chicago etc. Ry. Co. *v.* Wellman (1892) 143 U. S. 339, 345.

[6]Brewington *v.* Lowe (1848) 1 Ind. 21, 23.

[7]5 Pol. Sci. Quart. 255.

[8]Dicey, Law of the Const. 150.

of law into that of politics.[9] It is equally well settled that a court will not pass upon a constitutional question unless a decision upon the very point is unavoidable.[10] And the corollary follows that a court will not listen to the constitutionality of an act by a party whose rights it does not specially affect.[11] This last rule is of the broadest application, extending to all cases in law and equity, and to both civil and criminal proceedings.[12] The invalidity of statutes impairing the obligation of contracts can only be set up by a party to the contract alleged to be impaired.[13] And it seems to be universally held that a denial of equal rights and privileges by discriminatory legislation cannot be pleaded except by those able to show that they belong to the class discriminated against.[14] It is conceivable that in the case of an inseparable statute, depriving one class of individuals of some constitutional right, the courts might have permitted the question of its constitutionality to be raised by others against whom the objectionable features did not operate, provided their rights of life, liberty or property were to some extent affected by its enforcement. The opinion in *Lake Shore, etc., Ry. Co.* v. *Smith*,[15] in which the plaintiff railroad was allowed to raise the constitutionality of a law discriminating between passengers, seems to rest, in some degree, upon reasoning of this kind. But the case may be explained, and is supportable, upon the ground that an unreasonable classification, not subserving the convenience of the public, is an unconstitutional interference with the business of the carrier. The notion that persons not discriminated against can question the validity of a statutory classification has recently met an emphatic rejection in the highest courts of New York and Massachusetts.[16]

An unusual modification of the accepted rule as to the right to question discriminatory legislation was made in a recent Nebraska case. *Greene* v. *State*, (Neb. 1908) 119 N. W. 6. The legislature passed a law defining blackmail and fixing a penalty; but, apparently through an oversight, the law so read as to make blackmail criminal only when committed against a citizen or resident of Nebraska.[17] The acts of blackmail for which the defendant was convicted were in fact committed against citizens of Nebraska. Nevertheless, the defendant was permitted to challenge the constitutionality of the statute, not upon the theory suggested above, but because there was no possible way in which a non-resident, deprived of its protection, while temporarily within the state, could do so. Assuming that the rights of citizens of other states under Art. IV, Sec. 2 of the U. S. Constitution were infringed, the absence of any means by which such

[9]19 Am. Law Rev. 175; Bryce, Am. Com. (3rd Ed.) I, 257; 5 Pol. Sci. Quart. 253.

[10]Hoover *v.* Wood (1857) 9 Ind. 286, 287; Frees *v.* Ford (1852) 6 N. Y. 176.

[11]Sullivan *v.* Berry's Adm'r (1885) 83 Ky. 198, 204; Wellington, Petitioner (Mass. 1834) 16 Pick. 87, 96.

[12]Com. *v.* Wright (1880) 79 Ky. 22; Sinclair *v.* Jackson (N. Y. 1826) 8 Cow. 543, 579.

[13]Antoni *v.* Wright (Va. 1872) 22 Gratt. 833, 857; Williams *v.* Eggleston (1898) 170 U. S. 304, 309.

[14]State *v.* Currens (1901) 111 Wis. 431, 442; Pittsburgh, etc. Ry. Co. *v.* Montgomery (1898) 152 Ind. 1, 13; McKinney *v.* State (1892) 3 Wyo. 719, 726.

[15](1899) 173 U. S. 684.

[16]Matter of Keeney (1909) 194 N. Y. 281, 286; Malone *v.* Savings Institute (Mass. 1909) 86 N. E. 912.

[17]Laws of 1901, ch. 93.

persons might test the law is apparent. No authority was given to prosecute the crime when committed against a non-resident, and a criminal statute cannot by construction be made to embrace cases plainly without the letter, though within the reason and policy of the law.[18] There could be no prosecution under the common law, that having been repealed by the codification of the whole subject of criminal law.[19] Nor could a prosecuting officer, in behalf of the people, set up the unconstitutionality of the act.[20] While, in the present instance, a word to the legislature would undoubtedly have resulted in the correction of the erroneously drawn statute, a case is conceivable where the protection of the criminal laws might purposely be withheld from a particular class or race, under which circumstances such a course would be ineffectual. On the whole, while it is true that the defendant in the principal case could not, if the general rule were strictly applied, question the constitutionality of the law, a rule, which, it has been shown, is founded upon the desire of the courts to avoid officious meddling with legislative enactments, nevertheless, this element being entirely absent in the principal case, the action of the court, in view of the exceptional facts, and on grounds of necessity, would seem entirely justifiable.

STREET CLOSING AND PRIVATE EASEMENTS IN NEW YORK.—The closing of streets in furtherance of improved street plans, authorized by statute, involves two distinct classes of rights: those of the public, which the abandonment of the street *ipso facto* terminates, and those of the abutting owners, comprising private easements of access, light and air, which can be extinguished only by the parties, or by the state, in the exercise of its power of eminent domain. Under statutes providing merely in general terms for the vacation of streets, it has been held that these private easements are unaffected by the vacation of the street.[1] The existing New York statute, however, provides for the extinguishment of private easements upon payment of compensation.[2] In *Matter of the Mayor*,[3] the Appellate Division of the Supreme Court of New York (affirmed by the Court of Appeals without opinion)[4] has declared this a valid exercise of the power of eminent domain, on the ground that the primary purpose of the act in question is the public benefit from an improved street plan with the alleged advantages of travel, sewerage and drainage, and that the incidental private use by one individual of property taken from another is immaterial.

Although it is universally agreed that private property can be taken by the state for public use only, the term "public use" has eluded exact definition. Two views are, however, well marked: (1) Actual use by the public. Under this view it would seem that the property taken, or the servient tenement, where an easement is extinguished, must be subjected to the

[18]State *v.* Lovell (1867) 23 Ia. 304.

[19]Com. *v.* Cooley (Mass. 1830) 10 Pick. 37, 39; Com. *v.* Dennis (1870) 105 Mass. 162.

[20]People *v.* Rensselaer, etc. R. R. Co. (N. Y. 1836) 15 Wend. 113.

[1]Hollowell *v.* Southmayd (1893) 139 N. Y. 390.

[2]Chap. 1006, Laws of 1895.

[3](1898) 28 App. Div. 143.

[4](1898) 157 N. Y. 409.